IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 1878 of 2006

For Approval and Signature:

HONOURABLE MR.JUSTICE A.M.KAPADIA
HONOURABLE MR.JUSTICE K.A.PUJ

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?
2	To be referred to the Reporter or not ?
3	Whether their Lordships wish to see the fair copy of the judgment ?
4	Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?
5	Whether it is to be circulated to the civil judge ?

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THANMAL JUHARMAL JAIN - Appellant(s)
Versus
STATE OF GUJARAT - Opponent(s)

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Appearance :
MS RV ACHARYA for Appellant(s) : 1,
MR KT DAVE, Additional Public Prosecutor for Opponent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE A.M.KAPADIA

and

HONOURABLE MR.JUSTICE K.A.PUJ

Date : 22/12/2006

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE K. A. PUJ)

1. By instant appeal under Section 34 (4) of the Prevention of Terrorism Act, 2002 ('POTA' for short), the appellant/original accused No.5 seeks to challenge the order dated 15.9.2006 recorded below application Ex.227 in Special POTA Case Nos.3 and 5 of 2004 by the learned Special Judge, POTA, Ahmedabad, by which the application filed by the appellant – original accused No.5 under Section 227 of the Code of Criminal Procedure ('the Code' for short) for discharge, in connection with CR No.I-11/2003 registered at the DCB Crime Branch Police Station, Ahmedabad, has been rejected. It is,

therefore, prayed to quash and set aside the said order and he be discharged from the proceeding of Special Case No.3/2004 (Special POTA Case) from the Court of learned Special Judge (POTA), Ahmedabad and after perusing the contents of the application, the FIR and the charge, relieve the appellant from the charges framed under the POTA Act.

2. The brief facts of the prosecution case, as per the averments made in the FIR lodged by the Police Inspector, DCB Crime Branch Police Station, Ahmedabad and also pursuant to the investigation carried out by the investigating agency, are as under:

3. Accused No.1, Mohmad Yasin alias Prem is connected with and is a member of Lashkar-e-Toiba, a banned terrorist organization and is also closely working with suspect and absconding accused Mohmad Ashar, a resident of Pakistan and an agent of ISI which is also

alleged to be one of the chief source of supply of money to the said accused. It is also the prosecution case that ostensibly aggrieved by the plight of Muslim community in aftermath of Godhra incident, accused No.1, Mohmad Yasin alias Prem, sent huge sums from Dubai to his son – accused No.2, Mohmad Kasim, at Ahmedabad, which was to be used for preparatory work of terrorist attacks by imparting training to the youth for destabilizing the nation. The youth was instigated systematically in the name of religion and “jehad”. The said amounts were transferred by angadia firm called 'Patel On-line Services' through accused Nos.5, 3, 4 and 7 by way of hawala transactions. On secret information from the Central Intelligence Bureau, a close scrutiny over the activities of accused nos.1 and 2 was kept and on receipt of confidential envelop and cassette, a raid was carried out on 4.11.2003 on the flat owned by accused Nos.1

and 2, at Ahmedabad, where a fire-arm, AK 47, worth Rs.15,00,000/- and 60 live cartridges with two magazines were alleged to have been found. As the possible use of the weapons and the money received through hawala were alleged to be for spreading the terrorist network and for creating terror in the minds of people as well as shaking the integrity and unity of the country, the provisions of POTA were invoked.

4. In pursuance of the above conspiracy, one of the arrested accused sent lakhs of rupees to his son, who is also arrested, and other absconding accused which was given to him by Mohammad alias Azhar alias Raval, a Lashkar-e-Toiba operator/agent to spread the terrorist activities in India, particularly, in Gujarat. This huge amount pumped into India through illegal Hawala transactions. Firstly the amount was deposited with “Abdul Latif Money Exchange” of Dubai, managed by

absconding accused Aslambapu and satarbapu, who, in turn, instructed and directed the operators and partners of Patel On-line, a Mumbai based angadia firm, having its offices at Ahmedabad, Rajkot, Surat, etc., to provide and deliver the amount to the arrested and other absconding accused which was to be used for terrorist activities. Patel On-line Services is having illegal hawala transactions and running it through hawala operators. The appellant – Thanmal Jain, having contact with one Hafajaji, on his instance and direction, said accused deposited amount in “Bharat Account” with Patel On-line Services, Mumbai which in turn delivered to arrested accused as well as absconding accused for the purpose of terrorist activities. This amount was deposited with Bharat Account with Patel On-line Services, Mumbai at the instance and direction of Hafajaji based at Dubai, who is having illegal hawala business with Patel On-

line Services. The partners and operators of Patel On-line Services had delivered the amount deposited in Bharat Account by Hafajaji through the appellant, Thanmal Jain (Hawala Operator) to arrested as well as absconding accused for terrorist activities.

5. The appellant has also made voluntary confessional statement under Section 32 of the POTA before the investigating officers during the course of the investigation, wherein, also he has disclosed how the money was received by him on Patel On-line Services for distributing the same to other accused in Ahmedabad for purchasing the weapons which were to be used for terrorist activities in Gujarat.

6. In substance, the charge against the present appellant is that he, fully knowing that the amount so deposited, was to be utilized for illegal activities, which run

in a large scale in Gujarat State after Godhra riots, has abetted the commission of the offence punishable under POTA, IPC and also under the Arms Act.

7. The appellant had filed Criminal Misc. Application No. 2637 of 2006 before the learned Special Judge, POTA, Ahmedabad under Section 439 of the Code and Section 49 (6) of the POTA seeking his release on bail pending trial of Special POTA Case No.3 of 2004 mainly on the ground that he had earlier approached the POTA Court for bail by way of Criminal Misc. Application No.800 of 2004 which was after filing of the charge-sheet. The said bail application came to be dismissed vide order dated 15.5.2004. The appellant thereafter preferred Criminal Appeal No.1910 of 2004 before this Court. The said appeal was heard along with the appeals filed by co-accused being Criminal Appeal Nos.501 of 2004, 1208 of 2004 and

1335 of 2004 by a Division Bench of this Court and the Division Bench of this Court vide order dated 21.10.2005 rejected all the said appeals. The co-accused preferred SLP before the Supreme Court being SLP (Criminal) Nos. 5649/2005, 5809/2005 and 5857/2005. The said petitions came to be allowed by the Supreme court vide order dated 4.4.2006 and accordingly the said three co-accused (partners of Patel On-line Services) came to be released on bail. The appellant also thereafter filed SLP before the Supreme Court for bail being SLP (Criminal) No. (CRI.MP. NO(s).6307/2006) and the same was rejected by an order dated 14.7.2006 mainly on the ground of delay in preferring the said application and the delay was not condoned. The appellant thereafter filed application for bail before the POTA Court being Criminal Misc. Application No. 2637 of 2006 on the ground of parity as, according to him, he is similarly situated like the co-

accused and since the co-accused have been released on bail by the Supreme Court, he may also be released on bail pending trial.

8. The learned Special Judge, POTA rejected the said Criminal Misc. Application No.2637 of 2006 by order dated 7.8.2006.

9. Being aggrieved by the said order of the learned Special Judge, POTA the appellant original accused No.5 has preferred Criminal Appeal No.1670 of 2006 and the said Criminal Appeal was also summarily dismissed by this Court vide its order dated 15.9.2006.

10. After dismissal of the said Criminal Appeal, the present appellant – original accused No.5 has moved an application for discharge before the learned Special Judge, POTA which came to be rejected vide order dated 15.9.2006, which has given rise to the instant appeal under Section-34(4) of POTA.

11. Ms.R.V.Acharya, learned advocate appearing for the appellant has contended that the learned Special Judge has erred in appreciating the prosecution story being that the accused No.1, namely, Mohd. Yasin Noor used to send money to his son Mohd. Quasim Noor, being accused No.2 from Dubai. Thus, purely on the basis of information (hearsay) the prosecution has filed a charge-sheet and arrested the present appellant alongwith other co-accused to be prosecuted under the POTA Act, Arms Act and IPC, as the transaction of finances from Dubai was routed through the present appellant, being the first recipient and onward to M/s.Patel Onlines, who were to deliver the same to the accused No.2. She has submitted that only on this basis, it cannot be presumed that the appellant had the knowledge about who the final recipient of the amount would be and the finances, which being routed through this

hawala can be used, the appellant for any terrorist activity. She has further submitted that if these aspects are against the appellant, so also they stand against the co-accused persons, who work under M/s.Patel Online Services. However, as there was no incriminating evidence that the investigating agency has gathered against the appellant and these co-accused persons, except by way of forced / extorted confession, while in custody, even under these confessions nowhere it was admitted that the appellant had clear and specific knowledge about any terrorist activity being organised and for which these particular hawala transactions were being routed through him and for which the appellant was conscious abettor. She has, therefore, submitted that in the wake of no such evidence of knowledge attributed against the appellant, it is the fit case to discharge the appellant from the present prosecution under POTA.

12. She has further submitted that even looking to the contents of the FIR filed by the complainant, the PI – Shri Barot, it is pertinent to note that the opening of the FIR is in a dramatic fashion taking the entire case into the pre-independence era and the strained and enviable relationships that evolved between India and Pakistan, as also the evolution and role of ISI of Pakistan, who were germane to the idea of instigating jehadis and their terrorist acts in India and the formation of such terrorist organizations like the Lashkar-e-Toiba and other banned terrorist organizations in India. Further, the FIR has thrown light on the entire history, which has no concern with the present hawala transaction entered into between the appellant and other co-accused persons with the intention to abet under knowledge any terrorist activity in a manner as clandestine as alleged to be. She has

further submitted that undisputedly the guilt if ever be pointed out for a terrorist act, would be solely against the accused Nos.1 and 2 (i.e. The provider and the preparator of any intended terrorist activity). The act of the appellant would be only as a puppet on a chain or a mere tool, which has no knowledge of the resultant effect. The appellant, under these circumstances, is a pawn in the entire game and, therefore, his innocence cannot be abused under the allegations of an abettor. She has, therefore, submitted that the liberal considerations are required to be rendered in favour of the appellant.

13. Ms.Acharya further submitted that there is no substance in the allegation that after massacre it was decided amongst the Muslim community to protect themselves as well as their properties and to counter such attacks made over themselves by sponsoring terrorist activities through out India and it was,

therefore, essential for them to take assistance or help from banned terrorist organizations in order to achieve their object of their religious and communal security and foreign finances brought in the country through hawala agencies and are to be routed to various muslim terrorist organizations prevailing and existing in the Indian soil. She has submitted that the very particular transactions indulged by the appellant had no consequential resultant effect worth the name of any terrorist activity, so as to be prosecuted as is being so done. The entire FIR of the prosecution if at all to be believed as gospel truth, then the apprehension of any such activities is limited to the knowledge of accused Nos.1 and 2 only. Rest being pawns are prima facie innocents and need not be proved guilty, as the entire exercise of prosecution would be meaningless.

14. She has further submitted that even from the plain reading of confessional statements rendered by all the accused persons including the appellant none have shown any obvious knowledge or a whisper of any knowledge of any anticipated terrorist activity. Thus, the confessions are useless for the prosecution to initiate any such process of law into motion in attaining any ends of justice. Ms.Acharya further submitted that the confessional statement, even if seen on its bare reading or even microscopically scanned cannot throw any light to the fact that the appellant at the first instance knew that the accused No.1 is a known terrorist and wanted in India. Secondly, that the said accused had informed him to carry further the finance supplied to such a person at the fag end being a terrorist or a member or a terrorist organization. And thirdly, for doing these favours the said accused No.1 would reward the appellant in many folds. It

is not the case of the prosecution that the appellant under these circumstances had a common intention to achieve a common object for the accused No.1 and his purpose.

15. Ms.Acharya further submitted that at no point/stage of investigation, whereby the investigators have been able to pinpoint any terrorist activity that was anticipated as a backlash or otherwise any for which the cooperation and support of the appellant was volunteered in any guise to abet for the out come of such anticipated activity. Thus, in the wake of no such evidence to voluntarily abet for the cause of a terrorist activity, it cannot be said that the appellant is required to be tried for an offence under POTA. She has further submitted that the appellant was under the impression all throughout that he was transferring the money of Metal (Scrap) Dealers through 'hawala'. The said amount was being deposited in

M/s.Patel Online Services, as per instructions and directions given by accused No.1, deemed to be a businessman in the knowledge of the appellant. Thus, the appellant under these circumstances is nowhere connected with the distribution of the amount deemed to be for illegal activities as alleged. The job of the appellant was to only transfer money of Metal Scrap Dealers who were importing the scrap from various countries. The appellant was getting only Rs.300/- per lac as commission for carrying out the entire transaction. The appellant is, therefore, not involved for an offence under POTA. She has further submitted that the money was to be handed over to M/s.Patel Online and beyond that he was not required to know anything. Thus, from M/s.Patel Online Services it was in turn handed over to accused No.2, namely, Mohd. Kasim Noor, who was to distribute the said amount and as alleged was to carry out the

terrorist activity by distributing the said amount. Thus, it cannot be said that there was transparency of knowledge even to the appellant and it can be understood from the blocks of transaction that the appellant was not having the slightest knowledge about the resultant activity, whichever it be.

16. Ms.Acharya further submitted that the learned Special Judge, POTA has failed to consider before calling for a charge that for the applicability of the provisions of POTA Act it is not necessary that a person should belong to terrorist organization, or a person should profess to belong to a terrorist organization and, by proviso, it is further stated that this Sub-section shall not be applicable where a person charged is able to prove that the organization was not declared as a terrorist organization at the time when he became a member or began to profess to be a member; and that he has not taken part in

the activities of the organization at any time during its inclusion in the schedule as a terrorist organization. She has further submitted that the learned Special Judge, POTA has wrongly rejected the application for discharge without considering the substantial aspect of law and facts and thereby deprived the appellant to be placed on discharge, as the Hon'ble Supreme Court has taken a view in favour of the co-accused persons. She has, therefore, submitted that the impugned order is required to be quashed and set aside and the appellant be discharged from the charge levelled against him.

17. Mr.K.T.Dave, learned Additional Public Prosecutor, appearing for the respondent – State of Gujarat on advance copy being served to him has submitted that the learned Special Judge, POTA has rightly rejected the discharge application by observing that the Court has found sufficient prima facie

material to proceed against the appellant and hence framed the charge against him. Once the charge having been framed against the appellant it is not open for the learned Special Judge to discharge the appellant. If the appellant is aggrieved against the framing of the charge he should have approached the Higher Forum challenging the action of the learned Special Judge for framing the charge and not to move any discharge application. It is further submitted that the learned Special Judge has rightly observed that there are already 7 witnesses examined and the present appellant has not moved to the Higher Forum against framing of the charge and the discharge application was moved by the appellant only with a view to take the benefit of the order of the Hon'ble Supreme Court passed in respect of other co-accused and that no legal justification for deciding the said application on merits has requested for. He

has, therefore, submitted that without going into the merits of the matter, this Court should dismiss this appeal being devoid of any merits.

18. This court has considered the submissions advanced by Ms. R.V Acharya, learned advocate for the appellant and Mr. K.T.Dave, learned Additional Public Prosecutor for the respondent – State of Gujarat, perused the impugned order as well as the order dated 4.4.2006 passed by the Supreme Court in Petition for Special Leave to Appeal (Criminal) Nos. 5649/2005, 5809/2005 and 5857 of 2005, whereby the co-accused persons have been enlarged on bail pending the trial and the order dated 14.7.2006 passed by the Supreme Court in Petition for Special Leave to Appeal (Criminal) No. (CRI.MP.NO(s). 6307/2006), whereby the said SLP moved by the present appellant was dismissed on the ground of delay. We have also gone through the

voluntary confessional statement made by the appellant before the investigating officers during the course of investigation, as envisaged under section 32 of the POTA. We have also perused the judgment and order dated 9.3.2006 rendered in Criminal Appeal Nos.1156, 1157 and 1158 of 2004 filed by the other co-accused, whereby the order passed by the learned Special Judge, POTA rejecting the discharge application moved by the said co-accused was confirmed. We have also gone through the order passed by this Court in Criminal Appeal No.1670 of 2006 on 15.9.2006 confirming the order of learned Special Judge, POTA rejecting the bail application moved by the present appellant – original accused No.5.

19. Since all these points which are raised by the appellant in the present appeal were considered by this Court earlier while rejecting his bail application and since the

learned Special Judge, POTA has also not gone into the merits of those submissions once again we do not see it just and proper to examine those points once again in this appeal, especially when the charge has already been framed against the appellant and 7 witnesses have already been examined by the learned Special Judge, POTA. The ground regarding parity was also considered by this Court earlier as the present appellant has also filed separate petition being Special Leave to Appeal (Criminal) No.(CRI.MP.NO(s) 6307 of 2006. As there was delay in filing the Petition for Special Leave to Appeal before the Supreme Court and the Supreme Court vide order dated 14.7.2006 dismissed the Petition for Special Leave to Appeal (Criminal) No. (CRI.MP.NO(s) 6307 of 2006 by saying that it is barred by limitation and there is no reasonable explanation given by the appellant for the delay of 97 days in filing the petition. The order releasing the

co-accused was passed on 4.4.2006 whereas in the case of the appellant, the order was passed on 14.7.2006. Therefore its earlier order releasing the co-accused persons on bail was within the knowledge of the Supreme Court and it must have been pressed into service by the appellant when it decided the application of the appellant seeking condonation of delay in filing the Petition for Special Leave to Appeal. In spite of this fact, the Supreme Court has refused to condone the delay in filing the appeal by the present appellant and, therefore, there is a reason to believe that while deciding the Petition for Special Leave to Appeal by the appellant, the Supreme Court must have considered about the involvement of the appellant in the offence alleged against him and must have considered the voluntary confessional statement made by the appellant before the investigating agency during the course of investigation, otherwise the

Supreme Court would have even reserved liberty to the appellant to file fresh bail application before the POTA Court claiming parity with other co-accused persons. But having not done so, we are of the view that the Supreme Court was mindful and was very much aware that the appellant's case stands on a higher pedestal than that of the co-accused who have been released on bail and trial was stayed qua them. Therefore, according to this court, the appellant cannot be said to be similarly situated with other co-accused persons who have been enlarged on bail by the Supreme Court and whose trial has been stayed.

20. We have also considered the fact that the fresh bail application moved by the present appellant – original accused No.5 before the learned Special Judge, POTA was rejected and the said rejection order was confirmed by this Court. It has not been pointed out to

us that the order of this Court has been upturned by the Hon'ble Supreme Court and hence observation made and findings given by us in the said order hold good for the present appeal also. We, therefore, do not see any justification to interfere with the order passed by the learned Special Judge, POTA. The impugned order is, therefore, confirmed and the present appeal is summarily dismissed.

(A. M. KAPADIA, J.)

(K.A. PUJ, J.)

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